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No. 05-998

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
JUAN RESENDIZ-PONCE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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Vasquez v. Hillery, 474 U.S. 254 (1986). . . . . *passim*

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OTHER AUTHORITIES

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991). 11

Sara S. Beale et al., *Grand Jury Law and Practice* (2d ed. 1997).. ..... 11, 20

Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power* (1975). 21

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The Documentary History of the Supreme Court of the United States, 1789-90: The Justices On Circuit: 1790-94 (Maeva Marcus ed., 1990). 21

George D. Edwards, *The Grand Jury* (1906). 11

Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution*, 40 Ariz. L. Rev. 1305 (1998). 11

Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265 (2006) 11, 13, 21

Wayne LaFave et al., *Criminal Procedure* (2d ed. 1999). 20, 21

Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260 (1995). 19, 20

Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 Sup. Ct. Rev. 127. 21-22

Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1 (2002). 11

K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 Cap. Def. J. 61 (2004) 11

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Charles A. Wright et al., *Federal Practice and Procedure: Criminal 3d* (1999).. 30

Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941* (1963) 20

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance representation provided under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys employed by federal public and community defender organizations authorized under the CJA. NAFD promotes fair adjudication by appearing as *amicus curiae* in criminal-law matters, particularly those affecting indigent defendants. NAFD has appeared as *amicus curiae* in a number of recent cases before this Court.

NAFD files this brief because the Fifth Amendment's grand jury right is a central constitutional protection and the Solicitor General's position that an insufficient indictment should be subject to harmless error review demeans the grand jury's historic role and reduces that body's independence from the Executive and the Judiciary.

The parties have consented to the filing of the instant brief of *Amicus Curiae* on behalf of the Respondent. Their letters of consent were submitted with the brief.

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[1] No counsel for a party authored any part of this brief. S. Ct. Rule 37.6. No person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The denial of the Fifth Amendment right to indictment by a grand jury is a structural error. The indictment at issue in this case is constitutionally deficient: it fails to state an offense. This Court has long held that such an indictment is subject to automatic reversal.

The Court's automatic reversal cases vindicate the independence of the grand jurors and the discretion vested in them. *Stirone v. United States*, 361 U.S. 212 (1960), *Russell v. United States*, 369 U.S. 749 (1962), and *Vasquez v. Hillery*, 474 U.S. 254 (1986), hold that courts may not substitute their own judgment for that of the grand jurors; no court can replicate their discretionary review. That discretion extends to framing the charges, and even to the question of whether any charge should be filed at all.

The error here – the failure to submit all of the elements of the offense to the grand jury – directly implicates the grand jury's screening function. When the government fails to submit all of the elements, that omission affects the grand jurors' assessment of the case by removing (at least) one element – and the facts underlying it – from their consideration. The failure to submit all of the elements also implicates the grand jurors' self-directed investigative function. In order to perform a harmless error analysis, a court would have to both substitute its assessment of the missing elements (forbidden by *Stirone* and *Russell*) and speculate as to what investigative activities the grand jury may have undertaken and what the results of that investigation might have been. Because courts cannot reliably engage in these speculative inquiries, the error is structural.

The Court may avoid these difficult constitutional questions. Fed. R. Crim. P. 34(a)(1) provides that "the court must arrest judgment if . . . the indictment or information does not charge an offense." This mandatory language demonstrates that Congress did not intend application of harmless error analysis to this fundamental defect.

ARGUMENT

BECAUSE THE EFFECT OF THE FAILURE TO PRESENT ALL OFFENSE ELEMENTS TO A GRAND JURY CANNOT BE RELIABLY ASSESSED, SUCH ERRORS ARE STRUCTURAL

A. Introduction.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend. V. The Solicitor General concedes that an indictment not containing all the elements of the charged offense violates the Fifth Amendment. U.S. Br. at 9-10. The Court has held that the omission of an element from the indictment requires reversal because "[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell*, 369 U.S. at 770; *accord Stirone*, 361 U.S. at 217. The Court refuses to make such a "guess" because the grand jury possesses broad discretion to charge a lesser offense, fewer offenses, or no offenses at all pursuant to its screening function. *Vasquez*, 474 U.S. at 263-64. The discretion identified in *Russell*, *Stirone*, and *Vasquez* precludes reliable

assessment of the effect of the government's failure to present all of the elements of an offense to the grand jury. Therefore, the error is structural. *See United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 n.4 (2006) ("rest[ing its] conclusion of structural error on the difficulty of assessing the effect of the error") (citations omitted).

The Court may avoid these constitutional issues by recognizing that under Fed. R. Crim. P. 34, an indictment that fails to state an offense is not subject to harmless error review: "[u]pon the defendant's motion or on its own, the court *must* arrest judgment if . . . the indictment or information does not charge an offense." Fed. R. Crim. P. 34(a)(1) (emphasis added). Rule 34 must be read *in pari materia* with Fed. R. Crim. P. 52(a). *Hamling v. United States*, 418 U.S. 87, 134-35 (1974). Because Rule 34 contains mandatory language, Rule 52(a) cannot be read to require a harmless error analysis as to such an error. The Court should avoid the constitutional questions by finding that in Rule 34 Congress determined that an indictment's failure to state an offense is a structural error. *See Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

B. *Stirone* and *Russell* Hold That an Indictment That Omits a Theory of Liability or Fails to State an Offense Requires Automatic Reversal Because a Reviewing Court Cannot Substitute Its Judgment for That of the Grand Jury.

In *Stirone*, 361 U.S. 212, and *Russell*, 369 U.S. 749, the Court applied an automatic reversal rule to errors that, like the error here, went directly to the grand jury's screening

function.[2] In *Stirone*, the defendant was charged, in an indictment, with interfering with shipments of sand by William Rider into Pennsylvania. 361 U.S. at 213. The sand was "to be used for the erection of a steel-processing plant at Allenport, Pennsylvania." *Id.*

> The district judge, over petitioner's objection as to its materiality and relevancy, permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also in interference with steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky.

Id. at 214. The latter theory was not charged in the indictment; the former was. *Id.* at 217.

The Court held that the district court erred in permitting the petit jury to consider the theory of liability that the defendant interfered with steel shipments from the steel

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[2] In *United States v. Cotton*, 535 U.S. 625 (2002), the Court noted that *Russell* and *Stirone* rejected application of harmless error analysis to preserved indictment error, stating that "[w]e need not retreat from this settled proposition of law." *See id.* at 631. *Cotton* rejected the notion that a defective indictment was a jurisdictional defect. *See id.* (overruling *Ex parte Bain*, 121 U.S. 1 (1887)). Although both cite *Bain*, neither *Russell* nor *Stirone* relies upon *Bain*'s jurisdictional analysis, and *Cotton* therefore does not undermine them.

Nor does *Cotton*'s holding that the omission of a sentencing "element" from the indictment is reviewable for plain error undermine Respondent's argument that the omission of an element from the indictment is structural error. *See Johnson v. United States*, 520 U.S. 461, 466 (1997) (forfeited structural error is reviewed under the plain error standard).

plant in Pennsylvania into Michigan and Kentucky: "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *See id.* (citations omitted). The Court observed that "it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned." *Id.* In other words, the Court was concerned that the petit jury may have convicted Stirone by finding that the government had proved, beyond a reasonable doubt, that he interfered with steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky.

Even though the petit jury could have made that finding under the beyond-a-reasonable-doubt standard, the Court reversed because

> [t]he grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete.

Id. Because the petit jury could have found Stirone guilty under the theory of interference with the exportation of steel beyond a reasonable doubt, a reviewing court could certainly "know" whether a grand jury would have found probable cause as to that theory: it would have. But *Stirone* recognized that probable cause was not the sole issue; the question was, would the grand jury "have been willing to charge" that theory. By recognizing that no court could know what the grand jury would be willing to

charge, *Stirone* established that the grand jury possessed, in fulfilling its screening function, discretion that defied judicial review.

Russell adopted the same approach. There, the indictment was insufficient for failure to allege an offense element: the subject under inquiry by a congressional committee at the time of the defendant's refusal to answer questions. 369 U.S. at 753-55. By requiring a grand jury indictment, "Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry." *Id.* at 770. *Russell* held that the grand jury's prerogative could not be usurped by the other participants in the criminal justice system, the Executive and the Judiciary, because "[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of [his Fifth Amendment rights]." *Id.* If the grand jury's function is merely to determine probable cause, *Russell*'s reluctance "to make a subsequent guess as to what was in the minds of the grand jury," *id.*, makes little sense; a court would be even more skilled in assessing probable cause than the grand jury. Rather, *Russell* vindicated the grand jury's broad discretion in performing its screening function.

C. *Vasquez* Confirms That the Grand Jury Possesses Broad Discretion to Frame the Charges in an Indictment, Discretion That Cannot Be Replicated by a Court Performing a Harmless-Error Analysis.

1. *Vasquez* Vindicates the Understanding of the Grand Jury That Animated *Stirone* and *Russell.*

The Court built upon the analytical basis for its decisions in *Stirone* and *Russell* through its explication of the extent of the grand jury's discretion in *Vasquez v Hillery*:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a non-capital offense – all on the basis of the same facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained."

474 U.S. 254, 263 (1986) (quoting *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)); *accord Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (The grand jury "controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime."). Thus, "even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that

confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.*[3] *Vasquez* rejects the Solicitor General's contention that "the role of the grand jury is to indict whenever there is probable cause to believe that the accused committed the charged crime." U.S. Br. at 28.

Nor is there merit in the Solicitor General's suggestion, *id.* at 20, that *Vasquez*'s understanding of the grand jury's role is somehow limited to the context of racial discrimination: the Court's unwillingness to second-guess the grand jury's judgment in *Russell* and *Stirone* was based on the grand jury's broad discretion. *Stirone*, like *Vasquez*, recognized that probable cause was not the sole issue; the question was, would the grand jury "have been willing to charge" an additional theory. *See Stirone*, 361 U.S. at 217. By recognizing that no court could know what the grand jury would be willing to charge, *Stirone* anticipated *Vasquez*'s later holding that "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *See Vasquez*, 474 U.S. at 263.[4]

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[3] Justice Blackmun has identified an example of a grand jury's traditional discretion, stating that "it is conceivable that a properly instructed Kentucky grand jury, in response [to the very severe penalties associated with a habitual offender statute], would have refused to subject petitioner to such an onerous penalty for his forgery charge" even though there was sufficient evidence. *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting).

[4] In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), the Court observed that "[t]he nature of the violation [in cases such

(continued...)

Russell also anticipated *Vasquez*. There, the Court's refusal "to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment," 369 U.S. at 770, fits comfortably within the *Vasquez* paradigm. The Court's reluctance to make a "guess" as to how the grand jury would have exercised its discretion is a consequence of the courts' inability to interfere with charging decisions.

2. The Lower Courts Support *Vasquez*'s Description of the Scope of the Grand Jury's Discretion.

Although the lower courts have not often considered the scope of the grand jury's prerogatives, a number of opinions endorse *Vasquez*'s conception of the grand jury. *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1200 (9th Cir.) (en banc) (*Navarro-Vargas II*), *cert. denied*, 126 S. Ct. 736 (2005); *id.* at 1211-12 (Hawkins, J., dissenting); *United States v. Navarro-Vargas*, 367 F.3d 896, 899 (9th Cir. 2004) (Kozinski, J., dissenting)

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[4] (...continued)
as *Vasquez*] allowed a presumption that the defendant was prejudiced, and any inquiry into harmless error would have been unguided speculation." *Id.* at 257. If the grand jury's function is solely to determine probable cause, there is no reason to believe that the "inquiry into harmless error would have been unguided speculation," *id.*, because the analysis of whether there is probable cause after a jury verdict under the beyond-a-reasonable-doubt standard is not the least bit complex; there would always be probable cause. *See United States v. Mechanik*, 475 U.S. 66, 70 (1986) ("[T]he petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt.").

(*Navarro-Vargas I*); *Gaither v. United States*, 413 F.2d 1061, 1066 & n.6 (D.C. Cir. 1969); *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965) (Wisdom, J., concurring); *Natwig v. Webster*, 562 F. Supp. 225, 230 n.2 (D.R.I. 1983); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 942 (N.D. Ill. 1979); *Application of Jordan*, 439 F. Supp. 199, 202-04 & n.5 (S.D.W.V. 1977); *In re Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, 370 F. Supp. 1219, 1222 (D.D.C. 1974).[5]

The grand jury's freedom to decline to return an indictment even in a "case where a conviction can be obtained," *Vasquez*, 474 U.S. at 263, is fundamental to its role as a protector of the people from the power of the Executive.

> By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from

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[5] Numerous commentators agree with *Vasquez*'s conception of the grand jury. *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1299-1309 (2006); K. Brent Tomer, *Ring Around the Grand Jury: Informing Grand Jurors of the Capital Consequences of Aggravating Facts*, 17 Cap. Def. J. 61, 76 (2004); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. Rev. 1, 2 (2002); Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution*, 40 Ariz. L. Rev. 1305, 1361-62 (1998); 1 Sara S. Beale et al., *Grand Jury Law and Practice* § 1:6, at 1-32 (2d ed. 1997); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183-84 (1991); *see also* George D. Edwards, *The Grand Jury* 35-36 (1906) (describing grand juries rejecting cases in which there was probable cause because the grand jury viewed the offenses as not serious enough to merit prosecution).

> government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.

Cox, 342 F.2d at 189-90 (Wisdom, J., concurring). The grand jury thus acts as the "conscience of the community," *Gaither*, 413 F.2d at 1066 & n.6, in determining, on a normative basis, whether a prosecution *should* go forward. "That a grand jury may *legitimately* perform a quasi-equitable function is implicit in its role as 'an irresponsible utterance of the community at large, answerable only to the general body of citizens, from whom they come at random, and with whom they are at once merged.'" *United States v. Ciambrone*, 601 F.2d 616, 629 n.2 (2d Cir. 1979) (Friendly, J., dissenting) (quoting *In re Kittle*, 180 F. 946, 947 (S.D.N.Y. 1910) (L. Hand, J.)) (emphasis added). Therefore, as the Court has recognized, the grand jury has the authority to refuse to authorize a prosecution that it believes, for whatever reason, is unwarranted. *Vasquez*, 474 U.S. at 263.

The discretion exercised by the grand jury is thus analogous to that vested in the prosecutor. *See Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) (the grand jury's function "is most accurately described as prosecutorial");[6] *accord Navarro-Vargas II*, 408 F.3d

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[6] *See also Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting) ("There's no reason grand juries cannot or should not make . . . political judgments [as prosecutors do] about which laws deserve vigorous enforcement and which ones do not, in deciding (continued...)

at 1200 ("'[T]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury.'") (quoting *Butz v. Economou*, 438 U.S. 478, 510 (1978)); *id.* at 1213 (Hawkins, J., dissenting). As one commentator has observed, "[i]t is because the grand jury serves accusatory and investigative functions that a prosecutorial analogy is more apt." Kuckes, 94 Geo. L.J. at 1286. It is well-settled that the prosecutorial charging function is outside judicial supervision. *See generally United States v. Jacobo-Zavala*, 241 F.3d 1009, 1014 (8th Cir. 2001) (United States Attorney's decision to dismiss charges because the penalties were too severe was not subject to judicial review). By conducting a harmless error analysis as to the grand jury's decision to charge an offense that was never properly presented to it, a court would intrude upon an effectively unreviewable discretionary decision.

3. The Court Should Reject the Solicitor General's Attempt to Eviscerate *Vasquez*.

a. *Vasquez* Affirms Constitutionally-Mandated Discretion, Not "Nullification."

The Solicitor General incorrectly demeans the discretion described in *Vasquez* as an unreviewable – and illegitimate – power to "nullify" an otherwise valid

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[6] (...continued)
whom to indict, and on what charges."); Kuckes, 94 Geo. L.J. at 1307 ("[B]y viewing the indicting grand jury as a democratic force within the prosecutorial function, the grand jury's 'shield' and 'sword' functions are not distinct and competing functions, but part of the same integrated role – the exercise of discretionary authority to approve or decline criminal prosecutions.").

prosecution. U.S. Br. at 31-33.[7] But when a prosecutor chooses not to prosecute a case, that is not nullification; it is an exercise of prosecutorial discretion. Because the grand jury's "function . . . is most accurately described as prosecutorial," *see Navarro-Vargas I*, 367 F.3d at 900 (Kozinski, J., dissenting), its decision not to approve a prosecution for which probable cause exists is no more nullification than a similar decision made by a prosecutor.

Vasquez held that one of the reasons why racial discrimination in grand jury selection is so prejudicial – even after a petit jury conviction – is that the grand jury enjoys broad discretion in choosing what to charge and whether to charge at all, even in a case where there is not only probable cause, but proof beyond a reasonable doubt. *See* 474 U.S. at 263. If a grand jury's discretion not to charge an offense, or to charge a lesser offense, was not a *legitimate* grand jury function, then *Vasquez* could not have relied upon that attribute in determining whether the error in that case merited reversal.[8]

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[7] The term "nullify" is a misnomer. Even if a grand jury refused to indict, jeopardy does not attach. *See United States v. Williams*, 504 U.S. 36, 49 (1992).

[8] The Solicitor General's arguments echo those made in dissent in *Vasquez*. *See* 474 U.S. at 277 (Powell, J., dissenting) (objecting to the majority's reliance on the grand jury's discretion not to indict even if probable cause is established and arguing that "[a] defendant has no right to a grand jury that errs in his favor"). The grand jury's exercise of its discretion not to return an indictment is no more error than the prosecutor's discretionary decision not to seek an indictment or, in the case of a presentment, not to follow the grand jury's lead. *See United States v. Cox*, 342 F.2d 167 (5th Cir. 1965) (prosecutor declined to prosecute a charge made by a grand jury).

b. *Vasquez*'s Explication of the Grand Jury's Role Was Not *Dicta*.

Recognizing that his view of the grand jury contradicts *Vasquez*, the Solicitor General erroneously claims that the Court's explication of the grand jury's historic role was *dicta*. U.S. Br. at 20. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) (citations omitted). "'As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.'" *Id.* (citation omitted).

Vasquez decided whether the Court would apply a harmless error analysis to the racial discrimination that infected the selection of the grand jury that indicted Hillery. *See* 474 U.S. at 260. While the grand jury was tainted by discrimination, the indictment was adjudicated by an untainted petit jury. The state argued that Hillery's "conviction after a fair trial . . . purged any taint attributable to the indictment process." *Id.*

The Court's precedents did not support the state's position, *id.* at 261-62 (citation omitted), but *Vasquez* entertained the state's contention that those precedents should be overruled. The state argued "that requiring the State to retry a defendant, sometimes years later, imposes on it an unduly harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial." *Id.* at 262. *Vasquez* rejected the contention that the penalty was unduly harsh: retrial was not disproportionate to the

"grave constitutional trespass" of "intentional discrimination in the selection of grand jurors." *Id.*

As to the fundamental fairness contention, the Court explained why it was not "persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions." *Id.* at 263. The State's harmless error argument was that a conviction based upon proof beyond a reasonable doubt necessarily resolves the question of whether there was probable cause. Assuming that the grand jury's sole responsibility is to determine probable cause, an indictment returned by the most racially biased grand jury in the world could always be cured by the return of a guilty verdict by an unbiased petit jury under the reasonable doubt standard.

Vasquez disagreed, reasoning that the grand jury's powers are much more expansive: it need not indict at all, even where a conviction can be had, and it may choose to charge lesser or fewer offenses. 474 U.S. at 263. Harmless error analysis was impossible: "even if a grand jury's determination of probable cause is confirmed by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.* *Vasquez* thus found that the error was structural because racial discrimination was pernicious *and* because the grand jury's broad discretion prevents a reviewing court from ever knowing whether an unbiased and properly constituted grand jury would have exercised its discretion differently: "we simply cannot know that *the need to indict* would have been assessed in the same way by a grand jury properly constituted." *Id.* at 264 (emphasis added). *Vasquez*'s grand jury analysis is binding because

it is necessary to the decision *and* part of an "explication[] of the governing rules of law." *Seminole Tribe*, 517 U.S. at 67.

The dissenters recognized that the majority's discussion of the attributes of the grand jury was part of the *Vasquez* holding:

> The Court nevertheless decides that discrimination in the selection of the grand jury potentially harmed respondent, because the grand jury is vested with broad discretion in deciding whether to indict and in framing the charges, and because it is impossible to know whether this discretion would have been exercised differently by a properly selected grand jury.

474 U.S. at 275 (Powell, J., dissenting).

The Solicitor General argues that *United States v. Mechanik* "concluded that the considerations on which *Vasquez* was based 'have little force outside the context of racial discrimination in the composition of the grand jury.'" U.S. Br. at 20 (quoting 475 U.S. 66, 71 n.1 (1986)). While the *Mechanik* footnote correctly asserts that *Vasquez* rested on "precedent directly applicable to the special problem of racial discrimination," and that "racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future," 475 U.S. at 71 n.1, the cited passage from *Mechanik* does not purport to describe the entirety of the *Vasquez* analysis. In fact, the Court in *Vasquez* was asked to overrule the directly applicable precedent mentioned in *Mechanik*, and it declined to do so based on its conception

of the full range of the grand jury's discretion. Thus, *Vasquez* held, and *Mechanik* did not question, that mandatory reversal was required because of both the discrimination *and* the grand jury's discretion to determine "the nature or very existence of the proceedings." *See Vasquez*, 474 U.S. at 263.[9]

Moreover, twelve years after *Mechanik*, *Campbell v. Louisiana* reaffirmed *Vasquez*'s description of the grand jury's powers: the grand jury "controls not only the initial decision to indict, but also significant questions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision whether to charge a capital crime." 523 U.S. 392, 399 (1998) (citing *Vasquez*, 474 U.S. at 263).

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[9] The Solicitor General misreads *Bank of Nova Scotia v. United States*, when he claims it "characterized *Vasquez* as involving an 'isolated exception[]' to the harmless-error rule." U.S. Br. at 20 (quoting 487 U.S. 250, 256 (1988)). Actually, the Court stated "cases [such as *Vasquez*] *may* be explained as isolated exceptions to the harmless-error rule." 487 U.S. at 256 (emphasis added). The Court rejected that explanation in favor of "an alternative and more clear explanation . . . that [the cases exemplified by *Vasquez*] are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." *Id.* at 256-57. *Vasquez* explained that the reason why "the structural protections of the grand jury have been so compromised" was that no one could know how a properly selected grand jury would have exercised its broad, quasi-prosecutorial discretion in evaluating "the need to indict." *Vasquez*, 474 U.S. at 264.

c. The Historical Record Demonstrates That the Framers Likely Shared *Vasquez*'s Conception of the Grand Jury.

"There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello v. United States*, 350 U.S. 359, 362 (1956). "Undoubtedly the framers of the [Fifth Amendment] had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence." *Ex parte Bain*, 121 U.S. 1, 12 (1887).

Historical evidence of the institution's development in both England and this country's colonial period demonstrates that the grand jury's role in providing protection to the people from the Executive by acting as the "conscience of the community," *Gaither v. United States*, 413 F.2d 1061, 1066 n.6 (D.C. Cir. 1969), was a significant component of "the common-law estimate of the value of the grand jury," *Bain*, 121 U.S. at 12, as an important guarantor of personal freedoms. *See generally* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L. Rev. 260, 308 (1995).

The Framers certainly would have been aware of the celebrated case of an English grand jury resisting the Crown in 1681 with respect to the Earl of Shaftesbury and Stephen Colledge. *See id.* at 281-82, 308. In both of those cases, the grand jury withstood significant pressure from the courts and the Crown, and refused to indict Shaftesbury and Colledge on charges that were politically motivated.

Id. at 281-82. This refusal was perceived as a "turning point in the relationship between grand jury and government." *Id.* at 281; *accord* 1 Sara S. Beale et al., *Grand Jury Law and Practice* § 1:2, at 1-10 (2d ed. 1997).

The tradition begun in the Shaftesbury and Colledge cases continued in colonial America. In 1734, in the case of John Peter Zenger, grand juries refused to indict Zenger on seditious libel charges despite strong evidence of guilt. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1192 (9th Cir.) (en banc) (*Navarro-Vargas II*), *cert. denied*, 126 S. Ct. 736 (2005); *see also* 4 Wayne LaFave et al., *Criminal Procedure* § 15.3(c) (2d ed. 1999) (observing that "most of the celebrated instances of grand jury refusals to indict involved cases in which the evidence was sufficient, but the grand jury simply refused to permit an unjust prosecution"). Similarly, during the Revolutionary War, grand juries frequently refused to indict in tax collection cases in which merchants were accused of avoiding import and export payments. Leipold, 80 Cornell L. Rev. at 285. "The Revolutionary War experience helped lay the groundwork for the inclusion of the grand jury guarantee in the Fifth Amendment." *Id.*

There is little doubt that when the Fifth Amendment was adopted, the Framers were well acquainted with the full scope of the grand jury's protective power. *See* Richard D. Younger, *The People's Panel: The Grand Jury in the United States, 1634-1941*, at 25-30, 33-34 (1963); *accord Navarro-Vargas II*, 408 F.3d at 1198-99 (the grand jury institution reached the apex of its influence and utility in the pre-revolutionary colonial period); *Fields v. Soloff*, 920 F.2d 1114, 1117 (2d Cir. 1990) ("Just prior to the American Revolution, [grand juries] became vigilant in insulating from prosecution colonists who had violated

unpopular British laws."); Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power* 17-18 (1975). It is extremely likely, based on the colonial experience, that the protective powers set forth in *Vasquez* were perceived by the Framers as valued attributes. *See* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1302 (2006) (the grand jury's discretion not to indict was "'arguably . . . the most important attribute of grand jury review from the perspective of those who insisted that a grand jury clause be included in the Bill of Rights'") (quoting LaFave et al., *Criminal Procedure* § 15.2(g)). Because in interpreting the Fifth Amendment the Court must "place [itself] as nearly as possible in the condition of the men who framed that instrument," *Bain*, 121 U.S. at 12, the Court should reaffirm *Vasquez*.

Although the post-revolutionary period instructions cited by the Solicitor General do instruct grand jurors of a supposed duty to indict, U.S. Br. at 31 n.10,[10] those instructions are merely the views of individual jurists; they are not precedent, unlike *Stirone*, *Russell* and *Vasquez*. Moreover, that members of the judiciary have sought to impose on the grand jurors their views of the jurors' duties is certainly not dispositive;[11] the grand jury was envisioned

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[10] *But see* 2 *The Documentary History of the Supreme Court of the United States, 1789-1800: The Justices on Circuit: 1790-1794*, at 183 (Maeva Marcus ed., 1990) (grand jury charge of Justice Wilson, May 23, 1791) (advising grand jurors of the available penalties).

[11] Occasionally, such instructions have contained a political component. *See generally* Ralph Lerner, *The Supreme Court as*

(continued...)

as an independent body by the Framers: it "belongs to no branch of government, but is a 'constitutional fixture in its own right.'" *Navarro-Vargas II*, 408 F.3d at 1199 (quoting *United States v. Williams*, 504 U.S. 36, 47-50 (1992)). Judicial instructions could no more cabin the grand jurors' discretion than could the King force them to indict Shaftesbury and Colledge. *See id.* at 1200 ("The grand jury's discretion – its independence – lies in two important characteristics: the absolute secrecy surrounding its deliberations and vote and the unreviewability of its decisions."). To the extent that the non-precedential charges cited by the Solicitor General are persuasive at all, they promote a view of the grand jury that conflicts with that taken by the Court in *Stirone*, *Russell*, *Vasquez* and *Campbell*, and that which the Framers likely held.

D. *Bank of Nova Scotia* and *Mechanik* Are Inapposite Because They Involved Non-Constitutional Errors, Not the Grand Jury's Screening Function.

While a constitutionally deficient indictment that fails to state an offense cannot be reviewed for harmless error, other grand jury errors continue to be subject to Fed. R. Crim. P. 52(a), as was the case in *Bank of Nova Scotia v. United States* and *United States v. Mechanik*. In *Bank of*

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[11] (...continued)
Republican Schoolmaster, 1967 Sup. Ct. Rev. 127, 131 ("The Justices were quick to see and seize the chance to proselytize for the new government and to inculcate habits and teachings most necessary in their view for the maintenance of self-government. (In so doing they left later interpreters with the problem of distinguishing a defense of the regime and the Constitution from a defense of an administration and of a party.)").

Nova Scotia, "no constitutional error occurred during the grand jury proceedings." 487 U.S. 250, 258 (1988); *see id.* (cataloguing violations of Fed. R. Crim. P. 6). In *Mechanik*, the Court assumed that the prosecutors had violated Fed. R. Crim. P. 6(d) by allowing more than one witness to be present before the grand jury at the same time. *See* 475 U.S. 66, 69 (1986). In those cases, the Court was not required to speculate as to how the grand jury would have exercised its discretion with respect to an element that was never presented to it. Therefore, the structural error argument urged here has no application to the errors in *Bank of Nova Scotia* and *Mechanik*.

E. Because No Court Can Know What the Grand Jury Would Be Willing to Charge, the Omission of an Element From an Indictment Is a Structural Error, Despite the Solicitor General's Speculation That Some Such Errors May Aid the Defendant.

In the event that the Court reaffirms its explication of the grand jury's prerogatives in *Stirone*, *Russell* and *Vasquez*, the Solicitor General argues that the error is not structural because he speculates that the omission of an element from the indictment "may actually increase the likelihood" of a grand jury's exercise of its discretion on behalf of the defendant "by jurors who believe that the remaining elements should not constitute an offense." U.S. Br. at 34 (emphasis omitted). While that is a possibility, it is just as likely that the inclusion of an omitted element might lead the grand jury to decline to indict, particularly where that element substantially increases the potential penalty or even renders the defendant eligible for the death penalty *See Vasquez*, 474 U.S. at 263. Inclusion of an omitted element may prompt a grand jury to conclude that

the prosecutor has over-reached, such as when an attempt charge is accompanied by a particularly weak overt act. If evidence is offered regarding an omitted element, that evidence may cause the grand jury to question "the need to indict." *Id.* at 264.

But even in cases where there is no obvious benefit to the defendant in requiring consideration of all of the elements, the omission of an element[12] necessarily constricts the scope of the grand jury's inquiry. When the grand jury is presented with *all* of the elements, the scope of its inquiry is necessarily broadened; elements, after all, necessarily involve facts. A broadened inquiry, involving more facts, can affect the grand jury's assessment of a case in ways that a court cannot anticipate. *See, e.g.*, *Russell*, 369 U.S. at 770. Any broadening of the factual inquiry may bring to light previously unknown mitigating facts that may implicate the grand jury's quasi-prosecutorial discretion.

The inclusion of additional facts and elements may even prompt the grand jury to exercise its inherent investigative power, leading it to uncover still more facts that may affect its assessment of the case. *See United States v. Sells Engineering*, 463 U.S. 418, 423 (1983) (the grand jury "has always been extended extraordinary power of investigation and great responsibility for directing its own efforts . . . ."). The grand jury's capacity for *self-directed* investigation distinguishes *Neder v. United States*, 527 U.S. 1 (1999), where the Court applied harmless error

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[12] Although the example of a single omitted element is used here, there are no inherent limitations to the number of elements subject to the harmless-error rule that the Solicitor General proposes.

analysis to the omission of a single, uncontested element from the charge given to the petit jury. Petit juries have neither investigative capacity nor investigative responsibility. Therefore, the trial record adequately reflects what the trial jury was called upon to evaluate. Not so for the grand jury. Because it may perform self-directed investigations, no one can know what lines of investigation might have been pursued had the grand jury been asked to pass on every element of the offense; the record is incomplete. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2565 (2006).

The grand jury's ability to apply its community perspective to new facts and elements, and its potential to bring new facts to light by way of its self-directed investigations, "bear[] directly on the 'framework within which the [grand jury's screening function] proceeds.'" *Gonzalez-Lopez*, 126 S. Ct. at 2564-65 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). The end result is similar to that in *Gonzalez-Lopez*. There, in analyzing the deprivation of the defendant's right to choice of counsel, the Court observed that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* at 2565. Here, we cannot know "what different choices [the grand jury] would have made" with respect to its screening or investigative functions had it been asked to evaluate all the elements, nor can "the impact of those different choices" be "quantif[ied]." *See id.* In short, facts provide context, context informs discretion, discretion affects results in ways that cannot be predicted.

Ultimately, "neither this nor any other court can know that the grand jury would have been willing to charge" an offense containing the omitted element. *Stirone*, 361 U.S. at 217.[13] These dueling speculations only make clear that the grand jury's broad discretion insulates its decisions from judicial review: the error is structural because of "the difficulty of assessing [its] effect." *Gonzalez-Lopez*, 126 S. Ct. at 2564 n.4.[14]

F. An Indictment's Failure to State an Offense Is Structural Error Under Rule 34.

The Court has held that dismissal is the remedy for an indictment's failure to state an offense. *See, e.g., United States v. Carll*, 105 U.S. 611, 613 (1881). Rule 34 codified that remedy: "Upon the defendant's motion or on its own, the court *must* arrest judgment if . . . the indictment or

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[13] A defendant is denied his "substantial right to be tried only on charges presented in an indictment returned by a grand jury," *Stirone*, 361 U.S. at 217, when an element is omitted.

[14] The Solicitor General suggests that if grand jurors may exercise discretion akin to that of the prosecutor, "a similar conclusion would presumably be required concerning the omission of an offense element from the petit jury's instructions." U.S. Br. at 34. There is no merit in that suggestion. The institutional differences between the two types of juries have persisted without importing the characteristics of one into the other. For instance, prosecutors may withhold exculpatory evidence from the grand jury, *see United States v. Williams*, 504 U.S. 36 (1992), present unconstitutionally seized evidence, *see United States v. Calandra*, 414 U.S. 338 (1974), and offer only hearsay, *see Costello v. United States*, 350 U.S. 359 (1956). These characteristics of grand jury procedure have not been imported into petit jury practice. Nor will the grand jury's quasi-prosecutorial role.

information does not charge an offense." Fed. R. Crim. P. 34(a)(1) (emphasis added). The Solicitor General urges the Court to abandon its prior cases because it has applied harmless error analysis, pursuant to Fed. R. Crim. P. 52(a), to non-constitutional errors in *Bank of Nova Scotia*, 487 U.S. at 254-56, and *Mechanik*, 475 U.S. at 71-72. U.S. Br. at 17-19. These cases are not subject to Rule 34 because they do not involve an indictment's failure to state an offense.

Moreover, Rule 34(b) contemplates a motion made *after trial* – the precise situation under which the Solicitor General claims a harmless-error analysis is proper – and it requires district courts to arrest judgment if the indictment does not state an offense. Rule 34, like Rule 52(a), is "as binding as any statute duly enacted by Congress," *Bank of Nova Scotia*, 487 U.S. at 255, and its mandatory dismissal provision cannot be disregarded.

Rule 34 must be read *in pari materia* with Rule 52(a). *See Hamling v. United States*, 418 U.S. 87, 134-35 (1974). In *Hamling*, the defendant urged an automatic reversal rule for violation of Fed. R. Crim. P. 30(d)'s procedures for objections to jury instructions. The Court reasoned that "such an approach would be unduly mechanical, and would be inconsistent with interpretation *in pari materia* of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure, since Rule 52(a) specifically provides that '(a)ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" 418 U.S. at 134-35. Rule 52(a)'s generic remedial provisions were applicable because nothing in Rule 30 said otherwise.

Rule 34(a)(1), in contrast, does contain a remedial provision – one that makes arrest of judgment mandatory. When that provision and Rule 52(a) are read *in pari materia*, it is clear that Rule 52(a)'s generic remedial provisions do not apply to the specific violation to which Rule 34 speaks, an indictment's failure to state an offense. Rule 34's adoption of a mandatory remedy is, in effect, a Congressional determination that the failure to state an offense *does* affect substantial rights and *cannot* be disregarded.

That specific determination should control here. Rule 34's direct application, post-trial, to an indictment that fails to state an offense dictates that Rule 34's remedy, not the general rule contained in Rule 52(a), applies here: "[a] specific provision controls over one of more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) (citation omitted).

The Court reached a similar conclusion in *Zedner v. United States*, 126 S. Ct. 1976 (2006). There, the Solicitor General argued that Rule 52(a) should apply to motions to dismiss under the Speedy Trial Act. That act, 18 U.S.C. § 3162(a)(2), provides that in the event of a violation, "the information or indictment shall be dismissed on motion of the defendant." The Court rejected application of Rule 52(a), holding that "[t]he argument that the District Court's failure to make the prescribed findings may be excused as harmless error is hard to square with the Act's categorical terms." 126 S. Ct. at 1989-90 (citation omitted). The language of Rule 34 is no less categorical than that of § 3162(a)(2). *Compare* Fed. R. Crim. P. 34(a) ("the court must arrest judgment") *with* 18 U.S.C. § 3162(a)(2) ("the . . . indictment shall be dismissed").

Thus, Rule 52(a) is similarly inapplicable to Rule 34's mandatory rule.

Because Rules 34(a)(1) and 52(a), taken together, establish that an indictment's failure to state an offense affects substantial rights and cannot be disregarded, the fact that Respondent moved pre-trial for dismissal pursuant to Fed. R. Crim. P. 12(b)(2), *see* 2006 WL 1732858, at *10 (joint appendix), rather than Rule 34(a)(1), is of no moment. Both motions "essentially ask the same question: . . . whether the indictment is sufficient in all respects." *United States v. Wiggins*, 971 F. Supp. 660, 667 (N.D.N.Y. 1997) (citation omitted).[15] If Respondent's motion to dismiss the indictment was filed under Rule 34, Rule 52(a) would not apply, and reversal would be mandatory. Reading Rules 12, 34 and 52 together, the Rule 12 motion must be subject to the same standard in order to read the Rules as a coherent whole, as required by *Hamling*. *See* 418 U.S. at 134-35. Put another way, a system that employs two different standards of review to the same motion and penalizes a defendant with a worse standard for raising an issue *before* trial would be untenable. *See United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (the Court avoids interpreting statutes to achieve absurd results). The question of whether the error here is structural cannot turn on whether the motion to dismiss is predicated on Rule 12 rather than Rule 34. *See*

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[15] Like a Rule 12(b)(2) motion to dismiss, a motion to arrest judgment for failure to state an offense is based only on the indictment, not the facts adduced at trial. *See United States v. Esposito*, 492 F.2d 6, 9 (7th Cir. 1973) (citing *United States v. Sisson*, 399 U.S. 267 (1970)); *accord Guam v. Palomo*, 511 F.2d 255, 259 (9th Cir. 1975).

Fed. R. Crim. P. 2 (the Rules "are to be interpreted to provide for the just determination of every criminal proceeding, [and] to secure simplicity in procedure and fairness in administration . . . . "). Rule 12 was promulgated to eliminate complicated rules of pleading, *see* 1A Charles A. Wright et al., *Federal Practice and Procedure: Criminal 3d*, § 191, at 319-21 (1999), not to create them.

Rule 34 permits the Court to affirm without resolving whether the Fifth Amendment requires automatic reversal if an indictment fails to state an offense. *See Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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